

Unofficial Draft Transcript
July 10, 2013 - Afternoon Session

This portion of transcript for the afternoon session of United States v. Pfc. Bradley Manning was taken at Fort Meade, Maryland on July 10, 2013 by [Alexa O'Brien](#).

Since it is an unofficial transcript, it may contain errors.

- **Judge:** Army Col. Denise Lind
- **Prosecution:** Major Ashden Fein, Captain Joe Morrow, Captain Angel Overgaard, Captain Hunter Whyte, Captain Alexander von Elton
- **Defense:** Mr. David Coombs, Major Thomas Hurley, Captain Joshua Tooman
- **Witness:** Professor Yochai Benkler, law professor and co-director of Harvard's Berkman Center for Internet and Society

ALL RISE

Judge Col. Denise Lind

Please be seated. The court is called to order. Let the record reflect all parties present when the court last recessed are again present in court and the witness is on witness stand.

Captain Morrow?

Prosecution (Morrow)

Just a few more questions. Professor Benkler, you're still under oath.

Professor Benkler, have you ever seen a traditional news organization or journalistic enterprise actively solicit submissions of classified information?

Prof. Yochai Benkler

Um-- I've see tips being requested than um-- I wouldn't say as a standard practice.

For all necessity, no.

Prosecution (Morrow)

And, you've never been an intelligence analyst-- is that correct?

Prof. Yochai Benkler

No, I haven't.

Prosecution (Morrow)

You served in the I.D.F., but you weren't in the intelligence field?

Prof. Yochai Benkler

No, I was not.

Prosecution (Morrow)

And earlier you spoke about how a lot of the information in the Army Counterintelligence document was in open source?

Prof. Yochai Benkler

Information that I was able to glean myself from materials that were out in the open-- in that regard, yes.

Prosecution (Morrow)

And, um-- but, you didn't have access to all of the sources of the documents? You couldn't go back and verify every single source of information?

Prof. Yochai Benkler

Would you like me to talk about the footnotes given that they haven't been--

Prosecution (Morrow)

No--

Prof. Yochai Benkler

--unclassified?

Prof. Yochai Benkler

I believe you can talk about-- if it's any of the footnotes, but-- You didn't have-- you couldn't go back and check every single one?

Prof. Yochai Benkler

Well, are you comfortable with my talking about the footnotes?

Judge Col. Denise Lind

Let's wait for just a moment. Um--

Prosecution (Morrow)

No. Let's just move on.

Judge Col. Denise Lind

I'll just ask the question. Do you have access to them?

Prof. Yochai Benkler

I have access to the version that was online which included [the footnotes.]

[Here the issue is that military prosecutors had portions of the 2008 U.S. Army Counterintelligence Memo declassified for use in their case for against Manning for aiding the enemy and wanton publication. The footnotes do not appear from this exchange to have been declassified. So, Benkler is trying to ascertain if he is allowed to testify about the footnotes. The U.S.A.C.I.C. Memo is also charged against Manning under the Espionage Act.]

Prosecution (Morrow)

I want to read you a quote and get your thoughts on it, Mr. Benkler.

WikiLeaks described itself as the 'first intelligence agency of the people. Better principled and less parochial than any governmental intelligence agency, it is able to be more accurate and relevant. It has no commercial or national interests at heart; its only interest is the revelation of the truth. Unlike the covert activities of state intelligence agencies, WikiLeaks relies upon the power of overt fact to enable and empower citizens to bring feared and corrupt governments and corporations to justice.' Have you heard that mission statement before or seen it somewhere?

Prof. Yochai Benkler

Probably. I'm familiar.

Prosecution (Morrow)

It's somewhat similar to the mission statement that you highlighted earlier-- in terms of 'exposing'?

Prof. Yochai Benkler

It's-- That version [he is referring to the mission statement referenced in his testimony on examination by defense earlier], which was more predominant-- emphasized a more standard democratic transparency model rather than this-- how shall we call it-- more proactive form.

Prosecution (Morrow)

(laughs) In your experience, have you ever heard of a journalist refer to having an intelligence source? Now, journalists have sources, but have you ever heard journalist refer to having an intelligence source?

Prof. Yochai Benkler

I think they just mostly talk about confidential sources or sources rather than specifically intelligence sources.

Prosecution (Morrow)

And, in your experience, have you ever heard of a journalist refer to outing a spy in their organization?

Prof. Yochai Benkler

Outing a spy in their organization?

Prosecution (Morrow)

Yes. It sounds odd I know but it's--

Prof. Yochai Benkler

I think it's too hard to describe how people will use rhetoric within very large organization in very diverse forms.

Prosecution (Morrow)

Now, we've talked extensively about how initial reports-- not that extensively-- but we've talked about [how] initial reports about the release of the Department of State cables were somewhat inaccurate, is that correct?

Prof. Yochai Benkler

Yes.

Prosecution (Morrow)

And, um-- some press outlets reported that WikiLeaks had released 251,287 cables? And that-- now, would you agree that, that reporting was based on what WikiLeaks was saying about what they had in their possession?

Prof. Yochai Benkler

The reporting was based on what was understood-- on what was said was in WikiLeaks' possession, yes. But it didn't--

Prosecution (Morrow)

Yeah, and again-- newspapers just misreported that-- at the time there had been a release of that many-- at that time?

Prof. Yochai Benkler

Precisely. That it had been released. That it had been

released in un-redacted form. Neither of which was true.

Prosecution (Morrow)

And that was something-- at least in that case-- in November-- you can go back and say November 2010-- that was something you could independently verify?

Prof. Yochai Benkler

Yes.

Prosecution (Morrow)

Now, you're aware now that WikiLeaks released 251,000 purported Department of State cables in un-redacted form, right?

Prof. Yochai Benkler

Much later.

Prosecution (Morrow)

In August of 2011?

Prof. Yochai Benkler

[Did not respond verbally.]

Prosecution (Morrow)

Professor Benkler, you would agree that your views on this court martial are pretty well known? Is that correct?

Prof. Yochai Benkler

I have written publicly on this, so.

Prosecution (Morrow)

You wrote an Op-Ed for the New York Times-- or you co-authored an Op-Ed for the New York Times in March 2013?

Prof. Yochai Benkler

I did.

Prof. Yochai Benkler

And that was titled, '[Death to Whistle-Blowers](#)'?

Prof. Yochai Benkler

Yes.

Prosecution (Morrow)

Also, March 2013 you wrote an article for The New Republic?

Prof. Yochai Benkler

Ah, yes.

Prosecution (Morrow)

And that was titled '[The Dangerous Logic of the Bradley Manning Case](#)'?

Prof. Yochai Benkler

Yes.

Prosecution (Morrow)

Thank you. Nothing further.

Judge Col. Denise Lind

Mr. Coombs?

Defense (Coombs)

I didn't have any redirect until the last two questions.

I want to give you an opportunity to explain both of those Op-Ed pieces. Can you tell the Judge what the first Op-Ed piece was about?

Prof. Yochai Benkler

I wrote an article together with Floyd Abrams, who is a leading First Amendment lawyer who represented The New York Times and the Pentagon Papers case-- because we have disagreements between us on the substance of the specifics of WikiLeaks-- we have a different view-- but we agreed that it was particularly dangerous to the model of the way in which the 'free press' works.

If the threat to potential whistle-blowers and leakers was as great as a death penalty or life in prison-- and that even people who, like the two of us, disagreed on the merits of the particulars in this case-- could agree that the cost that finding Pfc. Manning guilty of aiding the enemy would impose-- in terms of the willingness of people of good conscious but not infinite courage to come forward and reveal-- would severely undermine the way in which leak based investigative journalism has worked in the tradition of free press in the United States.

Defense (Coombs)

And then the second piece?

Prof. Yochai Benkler

The second piece was a short, more popular version of the deep, long article that I gave.

I particularly emphasized there-- as best I remember-- the way in which WikiLeaks did serve a particular journalistic function-- and the way in which too excessive a punishment would destabilize the battles between transparency and the contribution we get there and the appropriate framework for-- for preventing unauthorized disclosure.

And, so the concern was that if-- essentially-- let me back up.

The logic I describe--- and in what I call the dangerous logic-- the logic I describe was that in order to-- once you accept that WikiLeaks is a new journalistic organization, if handing materials over to an organization that can be read by anyone with an Internet connection, means that you are handing over to the enemy-- that is essentially means that any leak to a media organization

that can be read by any enemy anywhere in the world, becomes automatically aiding the enemy.

The dangerous logic is that you essentially exclude the question of, 'Have you actually gone to the enemy?'

It's enough that was the logic of the claim that I was criticizing. It's enough that you've given it to a medium that is readable on the internet, for you to immediately-- move on.

And what I wrote was that, that can't possibly be the claim. There has to be something fundamentally more than simply giving to an organization that publishes as a journalistic organization, but is accessible everywhere in the world.

Defense (Coombs)

Thank you. Retrieving from Professor Benkler defense exhibit 'golf golf' from the witness and prosecution exhibit 45. No further questions.

Judge Col. Denise Lind

Professor Benkler, I have a couple of questions.

Early in your testimony you mentioned another leak organization, I believe-- did it begin with an 'L'?

Prof. Yochai Benkler

LiveLeak.

Judge Col. Denise Lind

LiveLeak. What is that?

Prof. Yochai Benkler

Frankly, it was-- it has not become a significant organization.

I mostly come across it in the context of that story. This was another early leaking organization that had much more

of an ethos of anything goes and anything could be posted.

And, I described it in the context of a Los Angeles Times story that was trying to describe WikiLeaks as part of the phenomenon of leaking sites, but then juxtapose these two sites.

LiveLeak-- to the best of my knowledge-- has not really developed into a significant source of insight-- and the core differentiation between them was that WikiLeaks was more careful in authenticating and more cautious in how it publishes.

Judge Col. Denise Lind

Would you consider LiveLeaks part of the Fourth Estate?

Prof. Yochai Benkler

I haven't really looked at it closely enough to see. It really would depend on its-- on its function. I'm not trying to avoid the answer. I don't want to pretend to knowing something about a site that I haven't really studied.

Judge Col. Denise Lind

I'm not suggesting that. I guess-- in your testimony earlier you talked about the Fourth Estate is broad-- and now sort of includes bloggers that-- and traditional newspaper organizations are melding-- if you will-- getting information from each other.

If a person-- anybody-- you, me, anyone here in the gallery had information that they weren't supposed to disclose for some reason or other-- or was protected-- contract bidding information or something like that for-- and put it on an individual blog for the world to see- is that person now a journalist?

Prof. Yochai Benkler

I don't think so. I think that-- well, it depends on the context.

If the-- if there is a direct violation of that person's

duty not to disclose, that doesn't get washed away by the fact that they disclosed it-- but this is the problem of defining a range of the journalist's privilege, as the Supreme Court wrote in *Branzburg*-- it's the liberty of the press is the right of the lonely pamphleteer with a mimeograph, as it is from the metropolitan press with the latest technologies.

It's a hard line to draw.

You would not-- if someone publishes in a form that is intended for the public, we see this a little bit with reporter's privileges cases in the Second, Third, and Ninth Circuit-- where they're working a little bit with questions of people who are doing the research by themselves-- and end up coming and saying, we can't distinguish between these.

We have to treat them for purposes of reporter's privilege where it exists-- in the states where it exists-- as within that reporter's privilege.

That's the line-- that is the place where I would like for the line-- in those states like New Jersey that have reporter's privilege. It's those line drawing exercises that I think are the most productive for our purposes here.

Judge Col. Denise Lind

Thank you. Any follow-up questions based on that?

Defense (Coombs)

No, Your Honor.

Prosecution (Morrow)

No, Your Honor.

Judge Col. Denise Lind

Temporary or permanent excusal?

Defense (Coombs)

Permanent excusal, your Honor.

Judge Col. Denise Lind

Alright, Professor Benkler, you are permanently excused. You're free to go or you can stay here in the courtroom.

Prof. Yochai Benkler

Thank you.

Defense (Coombs)

Your Honor, the defense rests.

Judge Col. Denise Lind

Alright. Pfc. Manning, you have not testified, is that your decision?

Pfc. Bradley Manning

Yes, your Honor.

Judge Col. Denise Lind

Alright, and the court was given a list of additional witnesses by the defense-- Is it also your decision not to call any of them?

Pfc. Bradley Manning

That is correct, your Honor.

Judge Col. Denise Lind

Is the government to have a rebuttal case?

Prosecution (Fein)

At this time the government does intend to have a rebuttal case, your Honor.

Judge Col. Denise Lind

Alright, and-- We spoke about timing issues at the 802

conference that we held earlier today-- and it's my understanding that the government is going to give the defense notice of the rebuttal case on Monday?

Prosecution (Fein)

Yes, your Honor. It's one of the two things we planned.

Judge Col. Denise Lind

And, you owe me the responses to the four motions for the finding of not guilty from the defense?

Prosecution (Fein)

Yes, ma'am.

By C.O.B. Thursday-- tomorrow we owe the four responses to that. Monday, we have scheduled that the court will hear argument-- if any-- on the motions to dismiss under R.C.M. 917-- and, if there is any argument on whether the government's rebuttal case-- if the defense has any arguments against whether we are inside or outside the scope-- well I guess outside the scope of the rebuttal.

Judge Col. Denise Lind

Alright, then we will be on the record then on Monday at 0930? Is that correct?

Prosecution (Fein)

Yes, Ma'am.

Defense (Coombs)

Yes, your Honor.

And the defense would request-- and, we can decide an exact time after this session-- but a time period in which the government gives us notice of rebuttal on Monday with the witnesses that they intend to call and the exact facts that are calling those witnesses in order to rebut some fact listed by the defense in this case-- but a time for that would occur on Monday-- and that way from that point forward, we could prepare argument and be prepared later

that same day to argue.

Judge Col. Denise Lind

Why don't we do this-- because it make my more sense to start later on, on Monday? Let's um-- when we finish here let's take a brief recess and talk about logistics and scheduling. So, we don't put something out and then change. And, I guess come back on the record and we'll have the definite way ahead.

Prosecution (Fein)

Yes, Ma'am.

Judge Col. Denise Lind

And, one thing I did want to mention to the defense-- well, two things actually-- Pfc. Manning, if this was a members case, my instructions to the members would be that the accused has an absolute right to remain silent.

You will not draw any inference adverse to the accused from the fact that he did not testify as a witness.

The fact that he did not testify must be disregarded by you. I intend to follow that instruction.

Pfc. Bradley Manning

Yes, Ma'am.

Judge Col. Denise Lind

And, the other issue I wish to address with the defense is-- there is a footnote in your motion for finding of not guilty for 641 that says based on your motion that you haven't contacted a particular evaluation expert.

You have now until-- we're not going forward until next Wednesday. So, you have time to do that should you want to and the Court will give you a continuance if you want to do that.

Defense (Coombs)

Yes, your Honor.

Judge Col. Denise Lind

Now, I'm not suggesting in anyway how I'm going to rule. I am just saying that the opportunity is there.

Defense (Coombs)

Yes, your Honor.

Judge Col. Denise Lind

Is there anything else we need to address before we recess?

Defense (Coombs)

No, your Honor.

Prosecution (Fein)

No, Ma'am.

Judge Col. Denise Lind

Okay. We'll probably come back-- do you think 15 minutes is about right or do you think we'll need longer than that?

Prosecution (Fein)

Fifteen minutes is good, Ma'am.

Judge Col. Denise Lind

Alright. Court is in recess until 1500.

ALL RISE

ALL RISE

Judge Col. Denise Lind

Please be seated. The Court is called to order. All parties are present when the court last recessed, are again present

in court. I believe we have reached a way forward.

The plan will be-- we will reconvene on Monday at 1500 and at that time if the parties want oral argument on rebuttal-- or the scope of rebuttal-- and the for defense 917 motions-- we'll do that at that time.

Depending on the ruling on rebuttal-- if there is going to be a rebuttal case-- we will begin on Thursday at 0930.

If not, we will have closing argument starting on Tuesday at 0930. So, whether we go on Tuesday or on Thursday will not be settled until Monday afternoon.

Is that the parties' understanding?

Defense (Coombs)

Yes, your Honor.

Prosecution (Fein)

Yes, your Honor.

Judge Col. Denise Lind

And the notice from the government's on rebuttal will be at 0900 on Monday morning--

Judge Col. Denise Lind

--to both the Defense and the Court?

Judge Col. Denise Lind

Yes, Ma'am

Prosecution (Fein)

Yes, Ma'am.

Judge Col. Denise Lind

Is there anything else we need to address now?

Defense (Coombs)

No, Your Honor.

Prosecution (Fein)

No, Ma'am.

Prosecution (Fein)

Alright, court is in recess until Monday at 1500.

ALL RISE